

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 14, 2007

KERRY DOWELL v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2000-C-1380 Seth Norman, Judge

No. M2006-02743-CCA-R3-PC - Filed January 8, 2008

The Petitioner, Kerry Dowell, appeals from the Davidson County Criminal Court's order dismissing his petition for post-conviction relief, arguing that the dismissal was erroneous because he did not receive the effective assistance of counsel at trial guaranteed him by the United States and Tennessee constitutions. Following our review, we conclude that the post-conviction court did not err by denying post-conviction relief. Consequently, we affirm the post-conviction court's order of dismissal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and JOHN EVERETT WILLIAMS, JJ., joined.

Trudy Bloodworth (on appeal) and Philip Perez (at post-conviction hearing), Nashville, Tennessee, for the appellant, Kerry Dowell.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Dan Hamm, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

In an opinion adjudicating the Petitioner's direct appeal, this Court set out the factual background underlying his offenses:

On January 31, 2000, Jacqueline Rogers, the victim, finished a short shopping trip at the Piggly Wiggly grocery store on Old Hickory Boulevard in Nashville, Tennessee, and after leaving the parking lot in her 1999 Kia car, she noticed movement in the back seat. The individual in the back seat then climbed into the

front passenger seat, subsequently told the victim to comply with directions he was giving her, and said, "Don't make me hurt you." The victim was unable to see the individual's face, but identified him as wearing a floppy blue hat. The individual took money, including four fifty-dollar bills, and jewelry from the victim. While at a stoplight, the victim then jumped out of the car, claiming she thought the individual was going to kill her.

The victim gave police a description of her car. Later that evening, a Nashville police officer spotted the car at a convenience store, and then spotted the [petitioner], wearing a floppy blue hat, leaving the convenience store. The officer initiated an arrest, at which time the [petitioner] got in the Kia and fled the scene, crossing several lanes of traffic. Subsequently, the [petitioner] jumped out of the Kia and was eventually apprehended by a K-9 officer. A search of the [petitioner] revealed a knife in his pocket, two fifty-dollar bills, some additional money, and a blue floppy hat.

The [petitioner] later gave a videotaped confession, in which he said that he got in the victim's unlocked car at the Piggly Wiggly and that, ultimately, the victim jumped out of the car while they were stopped at a red light. Later, the [petitioner] claimed he lied during the confession and that he borrowed the Kia from a person named Darrell, or "Delo," and then drove it to the convenience store. He claimed he "freak[ed] out" when the police confronted him, and so he just ran. . . .

The [petitioner's] motion to suppress the videotaped confession was denied after a hearing on June 29, 2001.

After a jury trial on July 16-17, 2001, the [petitioner] was . . . convicted of the following:

- (1) Kidnapping, in violation of Tennessee Code Annotated section 39-13-303, a Class C felony. This conviction was as a lesser-included offense of aggravated kidnapping and a merger of indictment counts one and two;
- (2) Carjacking, in violation of Tennessee Code Annotated section 39-13-404, a Class B felony;
- (3) Robbery, in violation of Tennessee Code Annotated section 39-13-401, a Class C felony;
- (4) Evading Arrest, in violation of Tennessee Code Annotated section 39-16-603, a Class D felony; and
- (5) Evading Arrest, in violation of Tennessee Code Annotated section 39-16-603, a Class A misdemeanor.

After a sentencing hearing on January 23, 2002, the [petitioner] was sentenced as a Multiple Range II offender to eight years for kidnapping, sixteen years

for carjacking, eight years for robbery, four years for the felony evading arrest, and six months for the misdemeanor evading arrest. The sixteen years for carjacking was ordered to be served consecutive to the other sentences, for an effective twenty-four-year sentence.

State v. Kerry L. Dowell, No. M2002-00630-CCA-R3-CD, 2003 WL 21486978, at *1–2 (Tenn. Crim. App., Nashville, June 27, 2003), perm. to appeal denied, (Tenn. Nov. 24, 2003). Ultimately, this Court reversed his conviction for felony evading arrest, but affirmed his remaining convictions and his sentences. See id. at *1.

The Petitioner filed a timely petition for post-conviction relief, and counsel was appointed. Subsequently, an amended petition was filed asserting that the Petitioner was entitled to relief because his constitutional right to the effective assistance of counsel at trial was abridged. Specifically, he argued that trial counsel was ineffective for the following four reasons: (1) by failing to adequately consult with the Petitioner and effectively prepare for trial; (2) by failing to present witnesses at trial, including an alibi witness; (3) by failing to adequately cross-examine and impeach the alleged victim; and (4) by failing to address instances of prosecutorial misconduct.

The post-conviction court held an evidentiary hearing during which the Petitioner testified that trial counsel only met with him “maybe six or seven times” prior to his trial, and that their meetings lasted approximately fifteen to twenty minutes each. At their initial meetings, the Petitioner stated that trial counsel would only discuss the possibility of the Petitioner entering a guilty plea. Moreover, trial counsel never reviewed any of the evidence with him and did not procure a transcript of the Petitioner’s preliminary hearing as requested. According to the Petitioner, it was apparent at the preliminary hearing that the victim could not identify him as her assailant, but trial counsel told him that a transcript of his preliminary hearing was not available and “never filed any motions” regarding the fact that the victim could not identify the Petitioner. The Petitioner believed that the victim could have been impeached at trial with her preliminary hearing testimony, which he posited would have “cast doubt” on “the extent of his guilt.”

The Petitioner further testified that he informed trial counsel prior to trial that an individual he only knew as “D-Lo” was the person from whom he had obtained the victim’s vehicle, and trial counsel never investigated the existence of D-Lo. Nor did trial counsel follow up on the Petitioner’s claim that a woman named Patricia Milton could provide alibi testimony. More specifically, the Petitioner explained how Milton’s and D-Lo’s testimony would have buttressed his defense:

The alleged crime that was committed was, I believe it was around the Super Bowl time and I was over at Ms. Milton’s house and we watched the Super Bowl together, you know, we had drank a little bit or whatnot and fell asleep. And I had got up and asked her if she would take me over to some guy’s house that I knew out [in] east Nashville. . . .

This is where D-Lo eventually drove up at where we was all hanging out at and he had [the victim's] vehicle and I had asked him at that time if I could use it to go to the store to get some more beer or whatnot.

At the time of the hearing, the Petitioner did not know the whereabouts of Milton or D-Lo and agreed that Milton was “possibly” dead.

The Petitioner also faulted trial counsel for failing to call any of the police officers who arrested him to testify at his trial. He claims that his confession was coerced because on the day he was arrested (two days before he gave his statement to detectives) one of the arresting officers slammed his head against a police car and sprayed him in the face with mace. The Petitioner was also aggrieved by trial counsel because he did not argue chain of custody issues regarding physical evidence recovered from the victim's car, namely a blue hat. Further, trial counsel did not request any continuance despite first receiving a copy of the Petitioner's confession and physical evidence (the hat) one month before trial. Nor did trial counsel explore the issue of prosecutorial misconduct when the prosecuting attorney had initially stated that the Petitioner had not made any statements to police.

On cross-examination, the Petitioner admitted that even if he had received a copy of the preliminary hearing transcript and his taped confession well in advance of trial, it would not have affected the testimony he gave at trial. Moreover, he conceded that he did not mention Milton during his trial testimony and that the jury discredited his attribution of the offenses to D-Lo. He also admitted that trial counsel filed a motion to suppress his statement prior to his trial, and after a suppression hearing, the trial court ruled that his confession was admissible. Additionally, he confirmed that he had apologized for being involved in the offenses at his sentencing hearing.

Trial counsel did not testify; he died before the hearing. The State did not present any proof, but stated that it would rely on the transcripts and the record as a whole to oppose the Petitioner's claim for post-conviction relief.

After the hearing, the post-conviction court entered a detailed order dismissing the Petitioner's petition. The post-conviction court stated that, if trial counsel “vociferously urged” the Petitioner to enter a guilty plea, such advice would have been prudent given the weight of the evidence inculcating the Petitioner—especially his confession which mirrored the victim's account of the offenses. The post-conviction court also noted that the Petitioner's testimony regarding Milton was dubious because he had never before claimed the existence of an alibi witness. In summation, the post-conviction court ruled as follows:

Upon review of the testimony proffered at the evidentiary hearing in this matter, the [c]ourt is of the opinion that the [P]etitioner has failed to prove by clear and convincing evidence that he was neither afforded [deficient] representation nor that he suffered prejudice as a result. It appears as though counsel's representation of the [P]etitioner did not fall below the standard demanded of attorneys in defending

criminal cases. The [P]etitioner's petition for post-conviction relief is therefore respectfully denied.

Analysis

On appeal, the Petitioner argues that the post-conviction court erred by dismissing his petition. Essentially, he contends that his constitutional right to the effective assistance of counsel was denied because of trial counsel's failure to sufficiently investigate the case, failure to subpoena material witnesses, failure to seek recourse for alleged prosecutorial misconduct, as well as his "failure to take the appropriate action when critical evidence was untimely disclosed and failure to consult with [the Petitioner] about the nature of his case and any possible defenses he may have to the charges contained in the [i]ndictment."

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution¹ guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's

¹ Our constitution states:

That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the county in which the crime shall have been committed, and shall not be compelled to give evidence against himself.

Tenn. Const. art. I, § 9.

conduct falls within the wide range of reasonable professional assistance.” Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel’s tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel’s alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court’s determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court’s findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. “However, a trial court’s conclusions of law—such as whether counsel’s performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court’s conclusions.” Id. (emphasis in original).

Regarding the Petitioner’s claim that trial counsel’s performance was deficient and prejudicial for failing to investigate and interview an alleged alibi witness (Milton) and the individual named D-Lo, we note that this Court has previously stated that in order to establish such a claim, the witnesses should be presented at the post-conviction hearing:

When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing. As a general rule, this is the only way the petitioner can establish that (a) a material witness existed and the witness could have been discovered but for counsel’s neglect in his investigation of the case, (b) a known witness was not interviewed, (c) the failure to discover or interview a witness inured to his prejudice, or (d) the failure to have a known witness present or call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of the petitioner. It is elementary that neither a trial judge nor an appellate court can speculate or guess on the question of whether further investigation would have revealed a material witness or what a witness’s testimony might have been if introduced by defense counsel. The same is true regarding the failure to call a known witness. In short, if a petitioner is able to establish that defense counsel was deficient in the investigation of the facts or calling a known witness, the petitioner is not entitled to relief from his conviction on this ground unless he can produce a material witness who (a) could have been found by a reasonable investigation and (b) would have testified favorably in support of his defense if called. Otherwise, the petitioner fails to establish the prejudice requirement mandated by Strickland v. Washington.

Black v. State, 794 S.W.2d 752, 757–58 (Tenn. Crim. App. 1990) (footnote omitted); see also State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986) (ineffective assistance of counsel not found where counsel did not investigate unknown alibi witnesses); Joseph Jackson v. State, No.

W2005-01181-CCA-R3-PC, 2006 WL 784786, at *6 (Tenn. Crim. App., Jackson, Mar. 28, 2006) (stating that “a petitioner’s failure to present the testimony of any witness that he claimed should have been at his trial is fatal to his complaints regarding his attorney’s investigation and failure to call witnesses”). Because the Petitioner did not present the alleged alibi witness’s or D-Lo’s testimony in support of his petition for post-conviction relief, he has failed to show by clear and convincing evidence that trial counsel’s performance was either deficient or prejudicial as regards either of them. His assertion that the arresting officers also should have been called to testify lacks merit for the same reasons.

The Petitioner’s complaints relating to his confession are also unfounded. Trial counsel moved to have the statement suppressed; the trial court held a hearing and denied the motion. On direct appeal, this Court upheld the trial court’s ruling. The Petitioner has not shown what more could have been done to prevent his confession from surfacing at trial. Consequently, he has not shown how trial counsel’s performance was deficient in this regard. Additionally, the Petitioner has not demonstrated in any way how the outcome of his trial would have been affected in his favor had trial counsel raised the issue of prosecutorial misconduct for the State’s allegedly belated compliance with discovery requests at trial. Similarly, given the strength of the evidence proving the Petitioner’s guilt, his arguments that the victim’s trial testimony should have been impeached with statements she made at the preliminary hearing regarding her inability to identify the Petitioner are not persuasive.

Conclusion

Based on the foregoing authorities and reasoning, we conclude that the evidence does not preponderate against the factual findings of the trial court. We also agree with the trial court’s conclusion that the Petitioner failed to prove by clear and convincing evidence that trial counsel’s performance was deficient or prejudicial. Consequently, we affirm the order of the post-conviction court dismissing his petition for post-conviction relief.

DAVID H. WELLES, JUDGE